NO. 95013-0

IN THE WASHINGTON SUPREME COURT

OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM;
CLALLUM COUNTY SHERIFF BILL BENEDICT;
CLALLUM COUNTY SHERIFF'S DEPARTMENT; and
CLALLUM COUNTY

Appellants,

v.

REAL PROPERTY KNOWN AS
(1) JUNCTION CITY LOTS 1-2 INCLUSIVE, BLOCK 35;
(2) LOT 2 OF THE NELSON SHORT PLAT LOCATED IN
JEFFERSON COUNTY; and
ALL APPURTENANCES AND IMPROVEMENTS THEREON, OR
PROCEEDS THEREFROM,

Respondents *in rem,*

STEVEN L. FAGER;
DBVWC, INC.; and
LUCILLE M. BROWN LIVING TRUST

Interested Parties.

ON APPEAL FROM
THE SUPERIOR COURT OF WASHINGTON
FOR JEFFERSON COUNTY
No. 09-2-00413-6

AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I. INTEREST OF AMICUS.

Richard J. Troberman, on behalf of the Washington Association of Criminal Defense Lawyers ("WACDL" herein) submits this brief in support of Petitioners in this case. WACDL is a professional association of over 800 private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and equity in the criminal justice system, including civil asset forfeiture. WACDL is concerned about the fairness of the use of civil forfeiture proceedings in the criminal justice system, especially where law enforcement has a pecuniary interest in the outcome of the proceedings.

II. ISSUE PRESENTED.

Pursuant to RCW 69.50.505(6), is a claimant who substantially prevails in a proceeding to forfeit property entitled to recover reasonable attorney fees that were reasonably incurred by the claimant in order to prevail in the forfeiture proceeding regardless of whether those fees were incurred in a related criminal proceeding.[1]

III. SUMMARY OF ARGUMENT.

The Court of Appeals ("COA" herein) correctly held that, pursuant to RCW 69.50.505(6), a claimant who substantially prevails in a civil forfeiture proceeding is entitled to reasonable attorney fees reasonably incurred by the claimant, even if some of those fees were

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[1] WACDL takes no position with respect to other issues raised by the parties.

incurred during a related criminal case.

While the criminal case and the forfeiture proceeding were clearly separate proceedings, they were unquestionably related. OPNET seems to concede this point in its opening brief in the COA:

> "RCW 69.50.505(6) does not allow an award of attorney's fees incurred in a criminal prosecution regardless of how related the proceeding is to a separate civil forfeiture proceeding."

OPNET Opening COA Brief, at 22. To establish how closely related the two proceedings were, one need look no further than OPNET's Motion to Dismiss the forfeiture proceeding, which was based entirely on the Findings of Fact and Conclusions of Law in the criminal case.

> "The Plaintiff's rely on, and incorporate by reference, the above captioned court file and the facts as outlined in (1) the Jefferson County Superior Court findings of fact and conclusions in *State v. Fager*, No. 09-1-00172-9 (date 1/9/2013), and (2) the Court of Appeals decision in *State v. Fager,* No. 44454-2 (date 2/10/2015)."

Motion to Dismiss, CP at 107-156. Thus, the COA correctly held that only those fees incurred in the criminal case that were "unrelated" to the civil forfeiture proceeding are to be disallowed on remand.

IV. ARGUMENT.

A. The COA did not adopt OPNET's argument that no fees incurred in the criminal case can be awarded in the civil forfeiture proceeding.

OPNET argued below that the trial court "erred in awarding Steven Fager attorney fees incurred in the criminal case under RCW

69.50.505(6) in the civil forfeiture proceeding."[2] If the COA agreed with OPNET, it could have simply said "no fees incurred in the criminal case can be awarded in the civil forfeiture proceeding." It did not do so. Likewise, if the COA intended to limit the attorney fees to only those fees incurred in the forfeiture proceeding, it could have said "On remand, the court shall determine the number of hours reasonably expended by Steven Fager in the civil forfeiture proceeding multiplied by a reasonable hourly rate." But again, it did not. Instead, it held more broadly: "On remand, the court shall determine the number of hours reasonably expended by Steven Fager to prevail in the civil forfeiture proceeding multiplied by a reasonable hourly rate." Slip Op. at 15 (emphasis supplied).

The COA did not cite to, let alone rely upon, any of the authority presented by OPNET in its briefing in support of its arguments that no fees incurred in the criminal case can be awarded in the civil forfeiture. In fact, the COA relied on the opposing arguments presented by Steven Fager in his briefing on this issue. For example, the COA did not adopt OPNET's argument that a statutory waiver of sovereign immunity must be strictly interpreted, or that the court should follow the American Rule of attorney's fees (OPNET's Opening Brief in the COA at 24-35).

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[2] Because the Court of Appeals opinion lacks clarity, Petitioners erroneously "assume that the appellate court accepted OPNET's argument that legal work filed in a criminal case cannot be considered work for the forfeiture proceedings." Amended Petition for Review at 12.

Instead, embracing Steven Fager's analysis, the COA looked to the legislative purpose of the attorney fees provision. Relying on this Court's opinion in *Guillen v. Contreras,* 169 Wn.2d 769, 777, 238 P.3d 1168 (2010), the COA concluded that the purpose of the attorney fees provision is "to provide greater protection to people whose property is seized," and "the legislature intended this attorney fee provision to be read liberally." Slip Op. at 12-13.

The COA concurred with Steven Fager's assertion that the work in the criminal case resulted in the dismissal of the forfeiture proceeding:

> Steven Fager argues that because the court suppressed the evidence seized for lack of probable cause and dismissed the charges in the criminal proceedings, Clallum County could not establish the property was subject to forfeiture in the civil forfeiture proceeding. **We agree**.

Slip Op. at 13 (emphasis supplied). It also explained how the doctrine of collateral estoppel precluded the use of the evidence suppressed in the criminal case from being introduced in the civil forfeiture proceeding, see, *Barindal v. Bonney Lake,* 84 Wn.App. 135, 142, 925 P.2d 1289 (1996), which led to the dismissal of the civil forfeiture proceeding.

The COA's analysis emphasizing the interconnectedness of the two proceedings would be totally superfluous and contradictory to a finding that no attorney fees incurred in a criminal case can be awarded in a civil forfeiture proceeding. Indeed, the opposite is true, and this was the COA's legal justification as to why fees incurred in the criminal

case may be awarded in the civil proceeding.

The COA then turned to OPNET's second argument, which challenged the reasonableness of the fees. Acknowledging that an appellate court will uphold an attorney fee award unless it finds that the court manifestly abused its discretion, the COA held that the trial court abused its discretion in this case by "awarding attorney fees based on factors unrelated to the civil forfeiture proceeding." The Court's use of the words "based on factors unrelated to" instead of "not incurred in" is both revealing and compelling. The Court singled out Finding of Fact 14 as the basis for its holding that the trial court abused its discretion, emphasizing three factors: (1) the duration of the case; (2) the fact intensive nature of the suppression motion; and (3) the way in which the State approached the criminal case. CP at 538. But this Finding, drafted by Claimants' counsel, was intended to be an explanation of why the fees in this particular case were higher than the average case; it was not a recitation of which fees were allowable.[3]

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[3] When a fee shifting statute, like the one at issue here, does not indicate how the attorney fees award should be calculated, this Court has applied the lodestar method. *Bowers, v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 1930 (1983). See, *Brand v. Dept. of Labor & Industries,* 139 Wn2d 659, 666, 989 P.2d 1111 (1999). A court arrives at the lodestar method by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Scott Fetzer Co. V. Weeks,* 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993). That is the method applied by the trial court in this case. The lodestar method may be adjusted to account for subjective factors such as the level of skill required by the litigation; the amount of potential recovery; time limitations imposed by the litigation; the attorney's reputation; and the undesirability of the case. *Bowers, supra,* 100 Wn.2d at 597.

Unfortunately, the COA did not explain why it considered those three factors "unrelated" to the civil forfeiture proceeding. Nor did it find error in any other finding addressing the fee issue. For example, Finding of Fact No. 10 (to which no error was assigned except as to the inclusion of more than one claimant) provides:

> 10. In determining whether the attorney fees were reasonably incurred, this Court looks to the nature of the work performed. Here, the motions to suppress related directly to the evidence plaintiffs intended to introduce in the forfeiture case. Specifically, without the successful suppression motion, it is unlikely claimants would have substantially prevailed in this forfeiture case. The work was reasonable.

Finding of Fact No. 10, CP at 537. Perhaps the COA was simply concerned about the total amount of fees requested (nearly $300,000.00) and just wanted a more extensive analysis of those fees by the trial court. We will never know. However, what we do know is that the remand was to determine the number of hours "reasonably expended by Steven Fager to prevail in the civil forfeiture proceeding . . ." If the COA was ruling that only fees that were incurred in the civil forfeiture proceeding are allowable under RCW 69.50.505(6), then it would have instructed the trial court to determine the number of hours "reasonably expended by Steven Fager in the civil forfeiture proceeding . . ." The COA's addition of the words "to prevail in" was not serendipity because, as noted above, the COA expressly acknowledged that Steven Fager prevailed in the forfeiture proceeding because of the successful

suppression motion in the criminal case.

Finally, the COA, "consistent with the purpose of RCW 69.50.505(6)" held that Steven Fager is entitled to reasonable attorney fees on appeal. Awarding Steven Fager attorney fees on appeal is inconsistent with the Court holding that no fees incurred in the criminal case are allowable in the forfeiture proceeding.

B. RCW 69.50.505(6) does not limit an award of attorney fees solely to those fees incurred in the civil forfeiture proceeding.

RCW 69.50.505(6) provides, in relevant part:

> In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant.

The statute provides that a claimant who substantially prevails is entitled to reasonable attorney's fees reasonably incurred by the claimant. The only limitations on attorney fees expressed by the legislature are that the fees be reasonable and that they be reasonably incurred.

The introductory language "In any proceeding to forfeit property under this title" defines the court or administrative proceeding in which the fee application is to be made. It does not, and could not, limit the fees reasonably incurred by the claimant to only those fees actually incurred in the forfeiture proceeding. Indeed, how is a court to determine if the fees were incurred "in the forfeiture proceeding"? Would it be based on the date that the fees were incurred? Or the reason

that the fees were incurred? Or the benefit obtained? Or the attorney's billing statement?

Although both the criminal case and the civil forfeiture proceeding were filed the same day, the forfeiture proceeding was later stayed pending the outcome of the criminal case. This was not unusual, and typically occurs because discovery in the civil case can often burden the rights of the claimant against self-incrimination, or can adversely affect law enforcement's investigation or prosecution. *Cf.* 18 U.S.C. §981(g)(1) and (2), where the stay is mandatory if requested and the conditions are satisfied.

While a stay order holds the court proceedings in abeyance, it does not relieve claimant's counsel from the obligation to act with diligence to gather evidence before the trail goes cold and witnesses are lost. Indeed, it would constitute professional negligence for a lawyer to cease all work preparing a defense to forfeiture simply because a stay was in place. Witnesses need to be interviewed while the facts are still fresh.[4] Counsel must also investigate and research legal and factual issues relevant to the forfeiture proceeding. Such research may well include potential motions to suppress evidence.

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[4] Here, the civil forfeiture case was stayed for over five years. The criminal case and the civil forfeiture proceeding both commenced on October 9, 2009. The criminal case did not end until after the Court of Appeals decision, *State v. Fager,* 185 Wn.App. 1050 (February 10, 2015). The Motion for Summary Judgment in the forfeiture proceeding was not filed until April 24, 2015, when the stay was lifted.

Investigation and research most likely will find utility in both the forfeiture and the criminal action because the two are often so closely aligned. OPNET urges the Court to ignore the realities of a lawyer's case preparation and to adopt a rule that looks only to the timing of when the fees were incurred rather than the true purpose for which the fees were incurred.

Although such work can be inextricably intertwined with the parallel criminal case, it does not mean that the fees were not, at least in part, incurred by the claimant in defense of the forfeiture proceeding. If Steven Fager had hired two lawyers at the outset, one to handle the criminal case and one to handle the forfeiture proceeding, they likely both would have done much of the same work. In that situation, there can be no question that the "civil" lawyer's fees would have been reasonably incurred by the claimant in order to prevail in the forfeiture proceeding. The outcome should not be different solely because Steven Fager hired only one lawyer for both matters.

C. Where the attorney fees overlap both proceedings, the Court should apportion the fees between the two proceedings.

Where the work overlaps both proceedings, the trial court should allocate a reasonable percentage of the fees to each proceeding in the court's discretion. This is not unlike the conclusion reached by this Court in *Guillen, supra*, where the Court apportioned the amount of attorney fees reasonably incurred based on the amount of property recovered. There, the Court observed:

> "We conclude that the attorney fee provision in RCW 69.50.505(6) was intended to protect people whose property was wrongfully seized. We hold that a claimant may recover reasonable attorney fees for any property the government has wrongfully seized under RCW 69.50.505. . . . Generally, the amount of a fee award will be left to the discretion of the trial court. We remand to the trial court to determine, consistent with this opinion, the amount of attorney fees reasonably incurred by the respondents in recovering the vehicle and the $9,342."

Guillen v. Contreras, supra, 169 Wn.2d at 780.

In this case, the search of the property occurred on October 1, 2009. The criminal case and the civil forfeiture proceeding each commenced on October 9. If Steven Fager had retained counsel to investigate the lawfulness of the searches and defenses to potential forfeiture of the property immediately following the execution of the warrants, but before either the criminal case or the civil forfeiture had commenced, would he not have ultimately been entitled to at least some of those fees as the prevailing party in the forfeiture proceeding? The fees would not have been incurred in either the criminal case or the civil case, because neither had yet been filed. The solution in that situation would be to apportion the fees between the two related proceedings. The same reasoning should apply where the fees are incurred in a criminal case that precedes the civil forfeiture proceeding.

How the trial court makes the apportionment is entirely within the court's discretion, absent a manifest abuse, as the trial court is in the best

position to determine how such fees should be allocated. See, *e.g.*, *Ermine v. City of Spokane,* 143 Wn.2d 636, 650, 23 P.3d 492 (2001). Here, the trial court determined that Steven Fager is entitled to recover 100% of the fees he incurred that are related to the civil forfeiture proceeding, after eliminating all fees that related exclusively to the criminal case. See, Finding of Fact No. 11, which was unchallenged except as to the reference to multiple claimants. CP at 537.

The trial court's decision to apportion 100% of the dual-purpose fees to the civil proceeding was reasonable in this case, based on several factors. The trial court found that the Fagers were far less concerned about the criminal case than in protecting their rights in the property in the forfeiture proceeding. Finding of Fact No. 7 (which was unchallenged except as to the reference to multiple claimants). CP 536. In the criminal case the Fagers were facing a sentencing guidelines range of 0-6 months and a maximum statutory fine of $10,000.00, while the property subject to forfeiture was worth in excess of $500,000.00.

The trial court also found that OPNET officers made false statements in the search warrant affidavits, which demonstrated "a reckless disregard for the truth." *State v. Fager,* No. 09-1-00172-9. This finding was affirmed by Division Two of the COA in *State v. Fager,* 185 Wn.App. 1050 (2015) (unpublished), at *6. It was the evidence obtained during the unlawful search that resulted in the filing of the forfeiture proceeding, which included the filing of a *lis pendens* on

October 9, 2009. CP at 21-23. The *lis pendens* clouded title to the property for over five years, during which time Steven Fager's rights in the property were severely curtailed (*e.g.*, he could not sell the property or borrow against it, nor could he risk making any improvements to the property because of the pending action).

Lastly, the trial court was aware that OPNET's primary motive in appealing the Superior Court dismissal order was an attempt to avoid having to pay Fager's attorney fees in the civil forfeiture proceeding, which they believed were already "substantial" from the criminal case. CP at 265-266.

If the trial court did not award Steven Fager the dual-purpose fees in the civil forfeiture proceeding, he would have suffered a significant loss even though he prevailed. That is exactly what this Court in *Guillen* sought to prevent. In other cases, on different facts, the trial court might find a more even apportionment. But absent a manifest abuse of discretion, a trial court's award of attorney fees will not be disturbed on appeal. There was no abuse of discretion here.

D. OPNET'S construction of RCW 69.50.505(6) would contravene the legislative purpose and gut the fee shifting provision.

The government has a direct pecuniary interest in the outcome of civil forfeiture proceedings. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 56, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). Forfeitures are not favored and such statutes are construed strictly

against the seizing agency. *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way,* 150 Wn.App. 387, 392, 208 P.3d 1189 (2009). See also, *United States v. One 1936 Model Ford V-8 De Luxe Coach,* 307 U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249 (1939). RCW 69.50.505(6) is to be liberally construed. *Guillen, supra,* 169 W.2d at 777.

If this Court were to hold that fees incurred in a parallel criminal case, no matter how related and necessary to prevail in a civil forfeiture proceeding, cannot be awarded to a substantially prevailing claimant, the fees shifting provision of RCW 69.50.505(6) would be effectively gutted. Seizing agencies would be free to pursue unlawful seizures and wrongful forfeitures without risk of paying attorney fees simply by filing related criminal charges, no matter how frivolous, in order to innoculate themselves from the fee shifting provision of RCW 69.50.505(6). They could test the lawfulness of their forfeiture action--no matter how wrongful--in the criminal case, without fear of incurring liability for claimant's attorney fees. That is clearly not what the legislature contemplated by enacting this provision, which was to provide greater protection, not less, to people whose property has been seized, and which is to be liberally construed. *Guillen, supra,* at 777-78.

The operative words of the statute are "reasonable attorney fees reasonably incurred by the claimant." Fees that are incurred by a claimant in order to prevail in a forfeiture proceeding are reasonably

incurred, regardless of the timing of when they were incurred.

V. CONCLUSION.

A claimant who substantially prevails in a civil forfeiture proceeding is entitled to recover all reasonable attorney fees that were reasonably incurred in order to recover property that was wrongfully seized. When such fees are incurred in a related proceeding, either prior to or simultaneous with the forfeiture proceeding, the result should be the same. Nothing in RCW 69.50.505(6) requires or justifies a different result.

RESPECTFULLY SUBMITTED this 25 day of April, 2018.

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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